CHAN SIA HOCK

v.

C & C GROUP SDN BHD & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
IAN HC CHIN J
[CIVIL APPEAL NO: 12-13-97-I]
21 MARCH 1998

CIVIL PROCEDURE: *Appeal - Cross-appeal - Whether High Court could review decision of lower court when there was no notice of cross-appeal - Whether could make orders in the interest of justice - Courts of Judicature Act 1964, ss. 29 & 69(5) - Rules of the Court of Appeal 1994, rr. 7(4), 7(5) - Rules of the High Court 1980, O. 55 r. 3*

CONTRACT: *Breach - Rescission - Sale and purchase agreement - Plaintiff given option to rescind contract and claim liquidated damages upon breach - Contract silent as to eventuality of non-exercise of option - Contract not rescinded upon breach - Whether plaintiff could claim damages for breach of contract - Contracts Act 1950, s. 74 - Applicability*

The appellant had entered into an agreement with the first respondent ('the agreement') whereby he sold to the latter a music lounge business for RM60,000. The agreement provided that the RM60,000 was payable in several instalments, and cl. 8 thereof stipulated that the appellant had the option to terminate the agreement and claim the RM15,000 liquidated damages upon the first respondent failing to pay two instalments consecutively. The first respondent's due performance of the terms of the agreement was guaranted by the second respondent.

The first respondent, after paying the appellant RM30,000, failed to pay the balance consideration sum aforesaid. The appellant in the circumstances issued a summons and claimed from the respondents RM30,000, being alleged damages for breach of contract. The first respondent defended the action and argued *inter alia* that (i) the agreement was unenforceable because the appellant was not the beneficial owner of the business at the material time; and (ii) the agreement was void for mistake under s. 21 of the Contracts Act 1950 as the appellant was unable to transfer the relevant entertainment licence to the first respondent. The defence aside, the first respondent also counter-claimed for the refund of RM30,000 already paid under the agreement.

The learned Sessions Court judge, whilst ruling that the first respondent had failed in its defence, ruled nonetheless that the appellant was not entitled to the damages sought for. According to the learned judge, the appellant's remedy was only confined to Clause 8 of the agreement, and since that clause did not allow the appellant to claim for the balance sum, the appellant's claim must of necessity fail. The finding aside, the first respondent's counter-claim was also dismissed by the learned trial judge.

The appellant appealed. The first respondent, however, did not cross-appeal against the dismissal of the counter-claim. Before the learned judge herein, questions *inter alia* arose as to: (i) whether the instant court could review the decision of the lower court when there was no notice of cross-appeal by the first respondent; (ii) whether the lower court was right in not awarding damages to the appellant.

Held:

[1] Notwithstanding the want of a notice of cross-appeal under O. 55 r. 3 Rules of the High Court 1980, it is nevertheless in the interest of justice, if there is any error in the decision of a lower court, that such error be corrected notwithstanding the failure to give any notice of cross-appeal. This power is derived by the High Court from s. 29 of the Courts of Judicature Act 1964 read together with s. 69(5) of the said Act.

[2] The appellant at the material time was entitled to sell the business to the first respondent and had provided the necessary consideration for the agreement under which he sued the first respondent. The facts also showed that there was no question of mistake or common mistake arising between the parties, as, being the beneficial owner, the appellant was ready and able to fulfill his obligation pertaining to the transfer of the entertainment licence. The lower court was therefore right in the conclusion that the first respondent had failed in all its defences.

[3] The agreement did not say that the appellant "must" terminate the agreement, but used rather the word "may" indicating an option. Therefore, if the appellant chose, as is the case, not to terminate the agreement, the position would then be governed by the law, that is the Contracts Act 1950, particularly s. 74 thereof which provides for compensation in the event of a breach of contract. In the circumstances, the court below was wrong in dismissing the appellant's claim for the balance sum under the contract.

[4] There will be judgment against the first respondent for the balance sum together with statutory interests and costs. The sum owing by the first respondent is a liability that is covered by the guarantee executed by the second respondent. That being so, judgment should also be entered against the second respondent for the balance sum with statutory interests and costs.

[Appeal allowed; order accordingly.]

Case(s) referred to:
Cheow Chew Khoon v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 ***(refd)***
Chua Ngah v. Ng Kie En [1968] 1 MLJ 267 ***(cit)***
Hadley v. Baxendale [1854] 9 Exch 341 ***(refd)***
Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 375 ***(cit)***
Teoh Kee Keong v. Tambun Mining Co Ltd [1968] 1 MLJ 39 ***(cit)***

Legislation referred to:
Contracts Act 1950, ss. 21, 74
Courts of Judicature Act 1964, ss. 29, 69(5)
Rules of the Court of Appeal 1994, rr. 5(1), 7(4), (5)
Rules of the High Court 1980, O. 55 r. 3

For the appellant - Stephanie Chin; M/s Tang & Partners
For the respondents - Richard Poh; M/s Chan, Kho, Poh & Co

Reported by WA Sharif

JUDGMENT

Ian HC Chin J:

Introduction

This is an appeal against the decision of the learned Sessions Court judge handed down on 30 July 1997 by which he dismissed the claim of the plaintiff Chan Sia Hock ("the appellant") and hence this appeal by him.

Facts Of Case

The appellant on 12 May 1993 entered into an agreement with C & C Group Sdn Bhd ("the 1st respondent") for the sale and purchase of the goodwill of a music lounge business and of the equipment, fixtures, fittings and chattels for the sum of RM60,000 which was to be paid (a) RM5,000 as deposit on the signing of the agreement and (b) eleven monthly instalments of RM5,000 beginning one month from the date of the agreement. The purchase price is also stated to include the various deposits held by the authorities concerned for the supply of water, electricity and telephone services, the right to the refund of which was given to the appellant. It is only upon full payment of

the purchase price that the appellant would "execute a registrable memorandum of transfer of the business name in favour of" the 1st respondent. The 1st respondent was allowed to commence business, by taking over the premises and the said equipment, fittings, fixtures and chattels before full payment of the purchase price. Provision was made in cl. 8 of the agreement for the eventuality of a failure to pay the instalment which term will be considered later when the issue of damages is considered.

Also on 12 May 1994, the 2nd respondent executed a guarantee under which he guaranted:

> (1) That the [1st respondent] will completely and faithfully carry out and comply with the performance and discharge the sale agreement and all agreements convenants stipulations and obligations therein contained and on the part of the [1st respondent] to be performed or observed thereunder.
>
> (2) If the [1st respondent] shall in any manner fail to perform the sale agreement I will pay to you on demand all monies which now are or during the currency of the said agreement or after the termination thereof be owing to you by the [1st respondent] under or by virtue of the said agreement or payable by the [1st respondent] to you whatsoever and all costs, charges, fees and expenses which you may incur in enforcing or seeking to enforce any security for or obtaining or seeking to enforce any security for or obtaining or seeking to obtain payment whether by court action or not of all or any part of the monies hereby guaranteed (including legal costs on solicitors' own client basis).
>
> (3) That you shall be at liberty to treat me as a principal debtor and I waive all suretyship and other right inconsistent thereto.

The 1st respondent paid a total sum of RM30,000 representing the deposit and five instalments. On 17 February 1994 the appellant's advocates demanded payment of the balance of RM30,000. After the 1st respondent and the 2nd respondent had refused to pay, the appellant issued a summons on 25 April 1994 claiming for the said sum of RM30,000 as being due under the said agreement.

The 1st respondent defended the action claiming (1) that the appellant at the time of the agreement "did not beneficially own the said goodwill business and chattels and had in fact already sold it to one JEREMY C.K. HOO" under a previous agreement, (2) that the 1st respondent had already purchased the same from the said Jeremy C.K. Hoo and had paid him RM90,000 under an agreement dated 15 December 1992, (3) that the agreement with the appellant was entered into as a result of a threat by the appellant not to renew the entertainment licence of the business which the 1st respondent was then already

operating after purchasing the same from C.K. Hoo and (4) that the agreement was void for mistake under s. 21 of the Contracts Act because the appellant was not permitted to transfer the entertainment licence. The 1st respondent counter-claimed the refund of the RM30,000 already paid. The learned Sessions Court judge dealt with the evidence adduced at the trial and dismissed the defence and counterclaim against which decision there is no appeal but it was argued that notwithstanding the want of a notice of cross-appeal, the 1st respondent is nevertheless entitled to challenge the decision. That question I will deal with shortly. The learned Sessions Court judge also dismissed the appellant's claim, the reasons of which will be referred to later.

Whether Can Review Decisions Of Lower Court When There Is No Cross-Appeal?

In arguing that the appellate court can do so, Mr. Richard Poh referred the court to *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 4 CLJ 127; [1995] 1 MLJ CA where it was held that r. 5(1) of the Rules of the Court of Appeal 1994 provides that appeals to the Court of Appeal shall be by way of rehearing and that under r. 7(4) and 7(5) the Court of Appeal is conferred with the power to make orders that the justice of the matter calls for even in respect of matters not appealed against or raised as a ground of appeal. This power actually comes from s. 69(5) of the Courts of Judicature Act 1964 and it is also conferred on the High Court in respect of appeals coming before it by virtue of s. 29 of the Courts of Judicature Act 1964 which says:

> All civil appeals from a subordinate court shall be by way of re-hearing, and the High Court shall have the like powers and jurisdiction on the hearing of appeals as the Court of Appeal has on the hearing of appeals from the High Court.

That argument, when carried to its extreme, would mean that so long as an appeal against a decision of a lower court is before an appellate court, the respondent therein is entitled to urge and the appellate court is entitled to review any decision of a lower court if it is in the interest of justice to do so and even though the respondent did not file any appeal against the decision of the lower court. What then of the requirement of O. 55 r. 3 of the Rules of the High Court 1980, which requires a respondent dissatisfied with a decision of a lower court to file and serve a notice (Form 113B) within seven days of the service on him of the memorandum of appeal? In so far as it is sought by that rule to limit the power conferred by s. 69(5) of the Courts of Judicature Act 1964, then it is impermissible; I believe that is trite law and I need not refer to any law for that proposition. That being the case, I am inclined to agree with Mr. Poh that the absence of any formal notice of appeal does not prevent the 1st respondent from arguing that the decision of the

learned Sessions Court judge was wrong if justice is to be done. This leaves the question of whether the appellate court has any discretion in not hearing arguments on issues of which there was no notice of appeal. It is difficult to see how the court can distinguish one case from another as justifying rehearing in one and not in the other when there is no notice of appeal from a respondent because, if there is any error in the decision of a lower court it is surely in the interest of justice that such error be corrected notwithstanding the failure to give any cross-notice of appeal. It is difficult to envisage any situation where it is not in the interest of justice to put right a wrong decision when the matter is brought properly by way of an appeal before an appellate court. It is also to be noted that no requirement was laid down by the legislation nor by the court that there should be any explanation regarding the absence of a notice of cross-appeal. I turn now to the arguments concerning the decision of the learned Sessions Court judge.

Was The Lower Court Wrong In The Various Findings?

It will be recalled four defences were put up. As for defence (1) the lower court came to the decision that the appellant had terminated a previous agreement for non-payment before entering into the agreement with the 1st respondent and was therefore entitled to sell the business to the 1st respondent. Mr. Poh had submitted that there it was not proved that the letter of termination of the previous agreement was served, that the letter should not have been admitted as the maker was not called and that in any event the termination was not good as the appellant continued to receive payment after the termination. The record of proceedings shows that Mr. Poh at the lower court expressly said he has no objection to the admission of the letter. How can the court allow him to resile from that position and to now argue the letter should not have been admitted. The letter shows the termination and evidence was led that after the termination the addressee came to see the appellant. There is no substance at all in this argument of Mr. Poh. Therefore, the appellant had provided the consideration for the agreement under which he sued the 1st respondent.

As for defence (2), it does not appear to have been pursued though it was pleaded. As for defence (3) that the 1st respondent was threatened to sign the agreement, the lower court had gone into the evidence and found that there was none and I cannot find any wrong with that finding. As for defence (4), it was pleaded that "the plaintiff was not permitted at all material times by the relevant rules and regulations of the local authorities in force to transfer the said entertainment licence described in para. 3(ii) of the statement of claim to the 1st defendant and therefore the said agreement is void for mistake by virtue of s. 21 of the Contracts Act 1950." As regards this contention, the lower court had found that:

> the 1st Defendant being in the entertainment business knew or ought to have known the technicalities of transfer of an entertainment licence done by the Local Authority and that "transfer" and the agreement was understood by all to mean that the Plaintiff would write to the authorities to have his licence transferred to the purchaser. Indeed it is the evidence of P.W.1, the Secretary of Majlis Bandaraya Kuching Selatan that such entertainment licence can be transferred if the preceding licensee writes to the Council. There was no question of mistake.
>
> Being the beneficial owner and not under any prohibition to transfer, the Plaintiff therefore was ready and able to fulfill his obligation.

The clause of the agreement providing for the licence is in these terms:

> 3. Upon full payment of the purchase price, the Vendor shall execute a registrable Memorandum of Transfer of the business name in favour of the Purchaser for registration with the Business Name Registry and transfer of the entertainment Licence to the Purchaser.

Mr. Poh before me commenced his submission on this issue by saying that the defence is that the appellant was not in a position to fulfill his part of the bargain in that he was not in a position to transfer the entertainment licence to the 1st respondent. That in my view is a wrong perspective of the defence. The defence is that there was a mistake and the law says that it must be a common mistake. It was not challenged when PW1 gave evidence as to the existing procedure governing the transfer of the licence and the lower court was right to construe the provision of the agreement in the light of the existing procedure and was therefore right in concluding that there was no mistake at all. Mr. Poh instead based his argument purely on the dictionary meaning of the word "transfer" without reference to the circumstances leading to the agreement and the law then prevailing which argument cannot be sustained.

Therefore, the lower court was right in the conclusion that all four defences failed. I turn now to the lower court decision not to allow the appellant damages which Ms. Stephanie Chin, learned counsel for the appellant, submitted was wrong.

Whether The Lower Court Was Right In Not Awarding Damages?

Though the lower court came to the conclusion that the defence had failed it did not award any damages for the following reasons:

> I do not think Clause 8 allows the Plaintiff to claim for the balance of the purchase price. The Plaintiff's remedy is wholly confined to Clause 8. He has not exercised his right under Clause 8. In any case, the entertainment licence, is still under the Plaintiff's name. He cannot recover the whole purchase price and yet still remain the beneficial owner which could happen if the Court grants

> him the relief of the balance of the purchase price. His remedy is the $15,000.00 as agreed liquidated damages for breach of the agreement by the Defendant if he had exercised his right under Clause 8 and having obtained such agreed liquidated damages, he would still remain the beneficial owner. I do not wish to refer to what happened to the business subsequently as I do not think this would be relevant. The claim of the [Appellant] for the balance of the purchase price is misconceived and ought to be dismissed.

As for the other evidence which the lower court did not wish to refer to, it related to the fact that the 1st respondent had sold the business to another party making it impossible for the 1st respondent to return the chattels as provided for under cl. 8. More of this will be said later. But first to the question of what is the true meaning of cl. 8. Clause 8 reads:

> 8. If the [1st Respondent] shall fail to pay any of the said instalments for two (2) consecutive instalments, after the same shall become due and payable, the [Appellant] may forthwith by notice in writing rescind this agreement and resume possession of the Scheduled Chattels comprised herein of which possession may have been given to the [1st Respondent] and the said deposit shall thereupon be forfeited to the [Appellant] and any previously paid instalments shall be retained by him. In addition thereto, the [1st Respondent] shall pay the [Appellant] a further sum of M$15,000.00 as agreed liquidated damages PROVIDED ALWAYS nothing herein shall prejudice the right of the Vendor to seek recourse by way of specific performance.

It is beyond argument that the clause gives the appellant the option in the event that the 1st respondent shall be in breach of the agreement to terminate the agreement with the result that the appellant would be entitled to resume possession of the chattels, to keep the deposit and instalments already paid and a further sum of RM15,000 as agreed liquidated damages. That clause also reserves the right of the appellant "to seek recourse by way of specific performance". As regards the question of specific performance, it is common ground that none has been prayed for. However, the clause is silent as to eventuality of the appellant not terminating the agreement. In this regard Ms Chin submitted that the position is governed by the Contracts Act 1950, with which proposition I am in agreement. Learned counsel is also correct in submitting that the lower court was wrong in concluding that the appellant's remedy was confined to terminating the agreement which conclusion does tremendous violence to the language of cl. 8. Clause 8 merely provides for the measure of damages in the event that the appellant chooses to terminate the agreement and to resume possession. It does not say that the appellant "must" terminate the agreement but rather the word "may" is used indicating an option. If the appellant chose, as is the case, not to terminate the agreement, the position would then be governed by the law, that is the Contracts Act 1950, particularly s. 74 which says that the party who suffers from a breach of the

contract is entitled to receive compensation for any loss or damage caused to him which naturally arose in the usual course of things from the breach or which the parties knew, when they made the contract, to be likely to result from the breach of it. The damage, according to Ms. Chin, is RM30,000 since the appellant had only got RM30,000 from a sale price of RM60,000. Ms Chin had relied on *Hadley v. Baxendale* [1854] 9 Exch 341 which ruled that:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Section 74 appears to follow the ratio of that case (see *Teoh Kee Keong v. Tambun Mining Co. Ltd* [1968] 1 MLJ 39 and *Selva Kumar a/l Murugiah v. Thiagarajah a/l Retnasamy* [1995] 2 CLJ 375; [1995] 1 MLJ 817)

Against that argument, Mr. Poh contended that since the appellant did not repudiate the agreement he was not entitled to sue for breach of agreement. That proposition is against the settled law that the innocent party is given an option either to terminate or to go on with the contract. (*Chua Ngah v. Ng Kie En* [1968] 1 MLJ 267). Where the appellant had not elected to terminate the agreement (which Mr. Poh had conceded is the case), the appellant would be entitled to sue for any existing breach. Any failure to pay any of the instalment would amount to a breach of the agreement entitling the appellant to sue. I cannot find any authority to say that the appellant must terminate the agreement before he can sue for any of the instalments that had fallen due, the failure to pay of which constituted a breach of agreement. In the event the sum of RM30,000 claimed by the appellant is within the language of s. 74. Therefore, the lower court was wrong in not entering judgment for the appellant against the 1st respondent for the sum of RM30,000.

In so far as the appellant's part to be performed regarding the "transfer" of the licence, it is no longer an issue because the evidence had shown that the 1st respondent had disposed of the business to a third party and no longer requires the licence. If it had been demanded and according to the evidence of PW1, a transfer can be considered by the authority. Therefore, performance on the part of the appellant regarding the transfer of the licence can easily be met by the appellant signing whatever forms or documents required by the authority to enable the transfer. It is not disputed that the appellant was willing and able to do so. Therefore, the fact that there was no transfer yet should not be a ground for not entering judgment for the plaintiff for the sum claimed.

In the premises, the judgment of the lower court is set aside and instead there will be judgment for the appellant against the 1st respondent for the sum of RM30,000 together with statutory interests and costs here and below. It follows from my conclusion that the counterclaim of the 1st respondent is without substance and was correctly dismissed by the lower court. I turn now to the issue surrounding the guarantee and this concerns the 2nd respondent.

Whether The Learned Sessions Court Judge Was Correct In Dismissing The Plaintiff's Claim Under The Guarantee Against The 2nd Respondent?

Ms Chin correctly pointed out that the learned Sessions Court judge did not refer to the guarantee nor to the 2nd respondent at all. The appellant had pleaded that the 2nd respondent had executed the guarantee, the terms thereof and the service of a demand for payment on the 2nd respondent. The 2nd respondent in his defence only admitted the receipt of the demand for payment while putting the appellant to "strict proof" of the rest which is hardly a defence. In any event, evidence was adduced, unchallenged, that the 1st defendant had signed the guarantee which was admitted as evidence. The sum owing by the 1st respondent was a liability that was covered by the guarantee. Mr. Poh did not submit otherwise. Therefore, judgment should also be entered against the 2nd respondent for the sum of RM30,000 with statutory interests and costs both here and below.

Conclusions

In the premises the appeal is allowed in the terms already stated by me.